IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Arb. C Nos. 51 & 53 of 2005

Judgment Reserved on : April 26, 2007

Date of decision : May 1, 2007

Arb. C No. 51 of 2005

Himachal Pradesh Mahila Vikas Nigam …Applicant.

Versus

M/s Jerath Electronics …Respondent.

Arb. C No.53 of 2005

M/s Jerath Electronics …Applicant.

Versus

Himachal Pradesh Mahila Vikas Nigam …Respondent.

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The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?[1]

For the applicant : Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate, in Arb.C No.51/2005, and Mr. B.N. Misra, Advocate in Arb.C No. 53/ 2005.

For the respondent : Mr. B.N. Misra, Advocate, in Arb. C No.51/2005 and Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate, in Arb.C No.53/ 2005.

Surjit Singh, Judge

These two applications, under Section 34 of the Arbitration and Conciliation Act, 1996, are being disposed of together, as the same award, i.e. award dated 17.3.2005 given by the Financial Commissioner-cum-Secretary (Revenue & Appeals),

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[1] **Whether reporters of the local papers may be allowed to see the judgment?**

Himachal Pradesh, who had been appointed as such by the Nominee Judge of the Hon'ble Chief Justice, under Section 11(6) of the Arbitration and Conciliation Act,1996, on a petition filed by M/s Jerath Electronics and Allied Industries Pvt. Ltd. (respondent in Arbitration Case No.51 of 2005 and applicant in Arbitration Case No.53 of 2005) has been challenged thereby.

2. First, the facts necessary for comprehending the questions involved may be noticed. H.P. Mahila Vikas Nigam (applicant in Arbitration Case No.51 of 2005 and respondent in Arbitration Case No.53 of 2005), hereinafter referred to as Nigam, made certain Bye-Laws, called 'Himachal Pradesh Mahila Vikas Nigam Bye-Laws for Financial Assistance, 1989'. Clause 5(b) of these Bye-Laws (repealed since 1992) provided that the Nigam would grant 4% relief on total investment made by a unit on a project, by way of subsidy, in a particular financial year if the unit provided employment to women to the extent of atleast 60% in that particular financial year and the number of total employees in that unit was not less than six, on an application made on Form-A-IV. Clause 17 of these Bye-Laws provides that in case of any dispute arising out of any provision or in any way touching or concerning the Bye-Laws, whatsoever, the matter shall be referred to the sole arbitration of the Secretary (Welfare) to the Government of Himachal Pradesh or his nominee acting as such at the time of the reference. M/s Jerath Electronics and Allied Industries Pvt. Ltd., hereinafter referred to as the Unit, claiming to have set-up a unit, wherein more than 60% women were employed during the years

1990-91 and 1991-92, laid claim for subsidy at the rate of 4% per annum, for the aforesaid two years, on the total investment made by it. The claim remained pending for quite some time and ultimately it was rejected on 11.9.1998 by the Financial Commissioner-cum-Secretary (Welfare) to the Government of Himachal Pradesh, through communication of that date addressed to the Unit. The Unit made an application to the Hon'ble Chief Justice, under Section 11(6) of the Arbitration and Conciliation Act, for appointment of an Arbitrator, because the Arbitrator, named in the Bye-Laws, i.e. Clause 17 thereof, had dealt with the claim of the Unit and rejected the same, vide communication dated 11.9.1998, in exercise of administrative powers.

3. Objections were raised on behalf of the Nigam before the Nominee Judge of the Hon'ble Chief Justice that there was no agreement between the Nigam and the Unit, within the meaning of Section 7 of the Arbitration and Conciliation Act and, hence, there could not arise any question of appointment of an Arbitrator. It was also stated that no dispute, within the meaning of Clause 17 of the Bye-Laws, was there between the parties and on this count also the application was liable to be dismissed. It was also alleged that the claim was barred by limitation, inasmuch as the subsidy was claimed for the years 1990-91 and 1991-92 while the Hon'ble Chief Justice had been approached for appointment of Arbitrator in the year 2000. It was also pleaded that Clause 5(b) of the Bye-Laws stood repealed in the year 1992 and, thus, the claim was not legally maintainable.

4. The Nominee Judge of the Hon'ble Chief Justice held that there was an implied agreement, because the provision of Clause 5(b) of the Bye-Laws of the Nigam was in the form of an open offer and anybody by setting-up a unit employing more than 60% women could accept that offer and make an application, on the prescribed form, to claim subsidy at the rate mentioned in Clause 5(b) of the Bye-Laws. The Nominee Judge of the Hon'ble Chief Justice further held that there existed a dispute referable for arbitration. The question of limitation was left open. Consequently, the application was allowed and Financial Commissioner-cum-Secretary (Revenue & Appeals), Himachal Pradesh, was appointed as Arbitrator.

5. After the application was allowed, the Unit made a claim petition to the Arbitrator, claiming subsidy at the rate of 4% per annum on the investment for two years, i.e. 1990-91 and 1991-92, in terms of Clause 5(b) of the Bye-Laws of the Nigam.

6. Nigam filed the reply opposing the claim on the grounds (a) the Arbitrator had no jurisdiction, (b) the claim was barred by time, (c) petition was vague, indefinite, confusing and lacked material particulars, (d) petitioner was estopped to file the claim, (e) claim was not covered by the Bye-Laws, (f) the Unit of the petitioner had not been sanctioned/ approved by the Nigam and, therefore, Clause 5(b) was not attracted, (g) petition was bad for non-joinder of necessary parties, (g) there was no written agreement between the parties, and (i) the petitioner had no cause of action.

7. The Arbitrator held that the Unit was entitled to subsidy, under Clause 5(b) of the Bye-Laws, at the rate of 4% per annum for the years 1990-91 and 1991-92 when it had employed 60% women and the number of the employees was more than six. Consequently, an award for Rs.6,77,656/- was passed in favour of the Unit and the Nigam was directed to pay the said amount within six months.

8. The grievance of the Nigam is that the award is contrary to law and the public policy of India and, hence, liable to be set aside. It is alleged that there was no agreement within the meaning of Section 7 of the Arbitration and Conciliation Act between the Nigam and the Unit and, hence, no reference to the Arbitrator could have been made. Also, it is alleged that the claim was barred by limitation. Further contention is that Clause 5(b) of the Bye-Laws, under which claim was made by the Unit, was not attracted because of the Unit having not been sanctioned or approved by the Nigam and in any case the said Clause stood repealed in the year 1992. Various other contentions have also been raised in the present application, under Section 34 of the Arbitration and Conciliation Act, by the Nigam but no submissions with respect thereto were made and, therefore, the same need not be noticed.

9. Grievance of the Unit is that interest has not been awarded by the Arbitrator on the amount, which became due to it at the end of the financial year 1992-93.

10. I have heard the learned counsel for the Nigam as also the Unit at length.

11. Learned counsel for the Nigam submitted that the order passed by the Hon'ble Chief Justice or his Nominee Judge, under Section 11(6) of the Arbitration and Conciliation Act, is only an administrative order and, therefore, any question or point dealt with in that order can be re-agitated, not only under Section 34 of the Arbitration and Conciliation Act, but even before the Arbitrator himself. He urged that in this case the Nominee Judge of the Hon'ble Chief Justice gave the finding that there was an agreement, within the meaning of Section 7 of the Arbitration and Conciliation Act, and a dispute referable to the Arbitrator also existed, but as a matter of fact there was no written agreement signed by the parties, within the meaning of Section 7 of the Arbitration and Conciliation Act, nor did any dispute referable to the Arbitrator exist. It was submitted that the Hon'ble Chief Justice or the Judge designated by him does not have the jurisdiction to finally determine the question whether arbitration agreement is there or not as also the question whether a dispute referable to the Arbitrator has arisen and only the Arbitrator has the jurisdiction to decide such questions and, therefore, the findings of the Nominee Judge of the Hon'ble Chief Justice are challengeable by way of objections, under Section 34 of the Arbitration and Conciliation Act, being without jurisdiction.

12. In support of his contention that there was no agreement, within the meaning of Section 7 of the Arbitration and

Conciliation Act, and there existed no dispute referable to the Arbitrator, learned counsel for the Nigam cited a number of judgments of the Hon'ble Supreme Court, the citations whereof are as follows. *Ruchi Strips & Alloys Ltd. v. TATA South East Asia Ltd., (2004) 13 Supreme Court Cases 470; Travancore Devaswom Board v. Panchamy Pack (P) Ltd., (2004) 13 Supreme Court Cases 510; Dresser Rand S.A v. 1. Bindal Agro Chem Ltd. 2. D.G. Khosla Compressors Ltd., (2006) 1 Supreme Court Cases 751; Tamil Nadu Electricity Board v. Sumathi and others, (2000) 4 Supreme Court Cases 543; Smita Conductors Ltd. v. Euro Alloys Ltd., (2001) 7 Supreme Court Cases 728; and Bihar State Mineral Development Corporation and another v. Encon Builders (I) (P) Ltd., (2003) 7 Supreme Court Cases 418.*

13. In the aforesaid precedents, it has been held as to what are the essentials of an Arbitration Agreement, within the meaning of Section 7 of the Arbitration and Conciliation Act, and that where reference to an Arbitrator is sought, based on agreement, reference cannot be made unless the essentials of written agreement are there.

14. Submission of the learned counsel for the Nigam that the Hon'ble Chief Justice or his Nominee Judge does not exercise the judicial powers, but discharges only administrative functions, while passing an order under Section 11(6) of the Arbitration and Conciliation Act, is contrary to the law declared by a Constitution Bench of the Hon'ble Supreme Court in *SBP & Co. v. Patel Engineering Ltd. and another, (2005) 8 Supreme Court Cases 618,*

wherein it has been held vide para-47(vii) that an order passed by the Chief Justice of the High Court or by the designated Judge of that Court (under Section 11(6) of the Arbitration and Conciliation Act) is a judicial order and, therefore, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court. It has also been held by the Constitution Bench that the Chief Justice or the Judge designated by him has the jurisdiction to determine the questions whether arbitration agreement is there or not and whether a dispute referable to the Arbitrator exists. That means an order by the Hon'ble Chief Justice or his Nominee Judge cannot be assailed by way of an application, under Section 34 of the Arbitration and Conciliation Act.

15. As a result of the above discussion, the contention that there was no agreement between the Nigam and the Unit and, therefore, the matter was not referable to the Arbitrator under Clause 17 of the Bye-Laws of the Nigam, cannot be accepted, because the Nominee Judge of the Hon'ble Chief Justice, as noticed hereinabove, has already held that there was an agreement in the form of an open offer contained in Clause 5(b) of the Bye-Laws and the acceptance of this offer by the Unit by setting-up an establishment employing more than 60% women and then making an application, on prescribed format, duly signed by a person authorized by it.

16. Next submission made on behalf of the Nigam was that the claim had become barred by time when it was filed before the Arbitrator. When confronted with the fact situation that the

claim of the Unit was rejected by the Secretary (Welfare) in September, 1998 and the Hon'ble Chief Justice was approached, under Section 11(b) of the Arbitration and Conciliation Act, for appointment of an Arbitrator in August, 2000, and the claim was made to the Arbitrator immediately after his appointment by the Nominee Judge of the Hon'ble Chief Justice and, therefore, the claim was apparently within time, the learned counsel for the Nigam submitted that no representation had ever been made to the Nigam by the Unit nor the Nigam had ever considered the Unit's claim or rejected it and, therefore, the date of rejection of the claim by the Secretary (Welfare), who had nothing to do with the affairs of the Nigam, cannot be used as the starting point of limitation against the Nigam. The argument cannot be accepted, because such a plea was not raised before the Arbitrator. In the reply that was filed before the Arbitrator, it was specifically stated in para-5 (of the reply on merits) that the claim of the petitioner had been rejected as far back as on 11.9.1998, per annexure P-2 (copy of the order of the Secretary Welfare) and, therefore, the claim, as preferred, was barred by limitation. No plea was raised that the Secretary (Welfare) had nothing to do with the affairs of the Nigam nor did he have the authority to consider and decide the claim of the Unit and, hence, the limitation was not to be counted from the date of the rejection of the claim by the Secretary (Welfare), vide communication dated 11.9.1998. Therefore, it is too late in the day for the Nigam to raise such a plea. Hence, the contention that the claim was barred by limitation is held to be without merit.

17. It was then contended on behalf of the Nigam that the Unit had not been sanctioned or approved by it and, hence, subsidy, under Clause 5(b) of the Bye-Laws of the Nigam, was not available. A reading of Clause 5 in its entirety shows that it has two parts. One part is contained in sub-clause (a), per which Nigam subsidizes rate of interest in respect of loan where the project of the concerned Unit is sanctioned by the Nigam. The other part, contained in sub-clause (b), pertains to grant of 4% relief by way of subsidy in a particular financial year, if the Unit provides employment to women to the extent of more than 60% in that particular financial year. This clause nowhere provides that this grant will also be available only to those units whose projects are sanctioned by the Nigam. In other words, claim under sub-clause (b) of Clause 5 of the Bye-Laws does not depend upon the condition of project of the unit being sanctioned by the Nigam, because such a condition is applicable only in respect of the benefit under sub-clause (a) of Clause 5 of the Bye-Laws. Hence, this contention is also rejected.

18. Lastly, it was submitted that Clause 5(b) of the Bye-Laws stood repealed by a resolution of the Board of Directors of the Nigam, passed in the year 1992. This argument will also not come to the rescue of the Nigam, for the reason that the claim of the Unit pertains to the period, prior to the repeal of the aforesaid sub-clause. Hence, this contention is also rejected.

19. As regards the application filed by the Unit, the learned counsel representing it, on being asked as to under what provision

of Arbitration and Conciliation Act or for that matter any other law this Court can grant interest (by partly setting aside the award to the extent the prayer for award of the interest has been rejected), as per prayer clause of the application, he submitted that the application may be dismissed as not pressed.

20. In view of the above discussion and findings, both the applications are dismissed.

(Surjit Singh)
Judge.

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